Uthayakumar a/l Ponnusamy v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–133–07 OF 2012
AMELIA TEE ABDULLAH J
3 APRIL 2013

Criminal Procedure — Witness — Subpoena — Applicant filed notice of motion to apply for subpoena issued against former Prime Minister of United Kingdom — Charge for writing letter with seditious tendencies addressed to former Prime Minister of the United Kingdom — Whether non-calling of subpoenaed party detrimental — Whether Prime Minister could give relevant or material evidence in relation to charge against applicant — Sedition Act 1948 s 4(1)(c)

The applicant filed a notice of motion to apply for a subpoena to be issued against the former Prime Minister of the United Kingdom, Right Honourable Gordon Brown. The applicant was a social activist of the *Peguam Hak Asasi Manusia* and an advocate and solicitor of the High Court of Malaya of 21 years' standing. He claimed to have been active in pro bono work for cases of public interest and admitted to having been arrested and detained under the Internal Security Act on 13 November 2007 and also to having been arrested by the police on two other occasions in respect of public interest cases. Two days before he was detained under the Internal Security Act 1960 for about 17 months, he was charged at the Sessions Court Kuala Lumpur for an offence under s 4(1)(c) of the Sedition Act 1948 ('SA'). However, the charge that was annexed as exh 'UK-1' was a charge for an offence under s 4(1)(a) of the SA. Initially, the applicant was charged for an offence under s 4(1)(c) and the charge was subsequently amended to one under s 4(1)(a). The charge stated that the applicant had committed an act that had a seditious tendency by writing a letter addressed to The Right Honorable Gordon Brown, Prime Minister of the United Kingdom which contained sentences with seditious tendencies. The applicant's solicitors had applied to the Sessions Court Registrar for the issue of a subpoena against The Right Honourable Gordon Brown. However, the court had rejected the application. The applicant averred that his solicitors had communicated with Messrs Dotcom Solicitors, a firm of solicitors in London, and they had agreed to make an application in the High Court in London for the purpose of serving the subpoena on The Right Honourable Gordon Brown. The issue that arose was whether The Right Honourable Gordon Brown could give any relevant or material evidence in relation to the charge against the applicant.

Held, dismissing the application:

(1) For an offence under s 4(1)(a), there was no necessity for the prosecution

to prove that The Right Honourable Gordon Brown had received the letter, or to prove the truth or otherwise of the contents of the said letter. There were no merits in the submissions for the applicant that it was only the right honourable Gordon Brown who could answer if the underlined portions in 'Jadual A' were seditious. The Right Honourable Gordon Brown was not a material witness in the charge against the applicant as the issue of whether the contents of the letter was seditious or otherwise was a matter for the sessions court to decide (see para 22).

(2) The deputy's submissions that the case in the sessions court was still at the prosecution stage. The prosecution had called three witnesses and there were no other witnesses to be called. The prosecution would be closing their case and the court would be moving to the stage of submissions of no case to answer. The sessions court had yet to make its ruling on whether a prima facie case had been made out and whether the applicant would be called upon to enter his defence (see para 23).

(3) The applicant's application to subpoena The Right Honourable Gordon Brown so as to enable the applicant to interview him and hence be able to cross-examine the prosecution witnesses to be irrelevant and inapplicable. There were no more witnesses to be called for the prosecution's case, the applicant would no longer have any witnesses to cross-examine. The applicant had not stated that there would be an application to recall prosecution witnesses for purposes of further cross-examination (see para 24).

[Bahasa Malaysia summary

Pemohon memfailkan notis usul untuk memohon sepina dikeluarkan terhadap bekas Perdana Menteri United Kingdom, yang amat berhormat Gordon Brown. Pemohon adalah aktivis sosial Peguam Hak Asasi Manusia dan Peguambela dan Peguamcara Mahkamah Tinggi Malaya yang beramal selama 21 tahun. Dia mendakwa telah aktif dalam kerja pro bono untuk kes-kes kepentingan awam dan mengaku telah ditangkap dan ditahan di bawah Akta Keselamatan Dalam Negeri ('Akta') pada 13 November 2007 dan juga telah ditangkap oleh polis atas dua keadaan yang lain berkaitan kes-kes kepentingan awam. Dua hari sebelum dia ditahan di bawah Akta untuk selama 17 bulan, dia dituduh di Mahkamah Sesyen Kuala Lumpur untuk kesalahan di bawah s 4(1)(c) Akta Hasutan 1948 ('AH'). Walau bagaimanapun, tuduhan yang telah dilampirkan sebagai eksh 'UK-1' adalah tuduhan untuk kesalahan di bawah s 4(1)(a) AH. Pada mulanya, pemohon dituduh untuk kesalahan di bawah s 4(1)(c) dan tuduhan tersebut kemudiannya dipinda kepada satu di bawah s 4(1)(a). Tuduhan menyatakan bahawa pemohon telah melakukan tindakan yang mempunyai kecenderungan bersifat menghasut dengan menulis surat dialamatkan kepada Yang Amat Berhormat Gordon Brown, Perdana Menteri United Kingdom yang mengandungi ayat-ayat dengan kecenderungan untuk menghasut. Peguamcara pemohon telah memohon

kepada Pendaftar Mahkamah Sesyen untuk pengeluaran sepina terhadap Yang Amat Berhormat Gordon Brown. Walau bagaimanapun, mahkamah menolak permohonan tersebut. Pemohon berhujah bahawa peguamcaranya telah berkomunikasi dengan Messrs Dotcom Solicitors, firma guaman di London, dan mereka telah bersetuju untuk membuat permohonan di Mahkamah Tinggi di London untuk tujuan menyerahkan sepina ke atas Yang Amat Berhormat Gordon Brown. Isu yang berbangkit adalah sama ada Yang Amat Berhormat Gordon Brown boleh memberi apa-apa keterangan relevan atau material berkaitan tuduhan terhadap pemohon.

Diputuskan, menolak permohonan:

(1) Untuk kesalahan di bawah s 4(1)(a), tidak perlu untuk pihak pendakwaan membuktikan bahawa Yang Amat Berhormat Gordon Brown telah menerima surat tersebut, atau membuktikan kebenaran atau sebaliknya kandungan surat tersebut. Tidak terdapat merit dalam penghujahan untuk pemohon bahawa ia hanya yang amat berhormat Gordon Brown yang boleh menjawab jika bahagian yang digariskan di dalam 'Jadual A' adalah bersifat menghasut. Yang amat berhormat Gordon Brown bukan saksi material witness di dalam tuduhan terhadap pemohon kerana isu sama ada kandungan surat adalah bersifat menghasut atau sebaliknya adalah perkara untuk diputuskan oleh mahkamah sesyen (lihat perenggan 22).

(2) Hujahan timbalan bahawa kes di mahkamah sesyen adalah masih berada di peringkat pendakwaan. Pihak pendakwaan memanggil tiga saksi dan tidak ada saksi-saksi untuk dipanggil. Pihak pendakwaan akan menutup kes mereka dan mahkamah akan meneruskan kepada peringkat hujahan bahawa tiada kes untuk dijawab. Mahkamah sesyen belum lagi membuat arahannya atas sama ada kes prima facie telah dibuat dan sama ada pemohon akan dipanggil untuk memasukkan pembelaannya (lihat perenggan 23).

(3) Permohonan pemohon untuk mensepina Yang Amat Berhormat Gordon Brown untuk membolehkan pemohon menemuramahnya dan oleh itu boleh memeriksa balas saksi-saksi pihak pendakwaan adalah tidak relevan dan tidak boleh dipakai. Tiada saksi lain untuk dipanggil bagi kes pendakwaan, pemohon tidak lagi mempunyai mana-mana saksi-saksi untuk diperiksa balas. Pemohon tidak menyatakan bahawa akan terdapat permohonan untuk memanggil semula saksi-saksi pihak pendakwaan untuk tujuan pemeriksaan balas selanjutnya (lihat perenggan 24).]

Cases referred to

Dato' Seri Anwar bin Ibrahim & Anor v Public Prosecutor [2000] 3 MLJ 638, CA (refd)

Ismail v Hasnul; Abdul Ghafar v Hasnul [1968] 1 MLJ 108, FC (refd)

King, The v Baines and another [1909] 1 KBD 258 (refd)

Legislation referred to

Internal Security Act 1960
Sedition Act 1948 s 4(1)(a), (c)

M Manoharan (M Manoharan & Co) for the applicant.
Noorin bt Badaruddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Amelia Tee Abdullah J:

DECISION

[1] The applicant, Uthayakumar a/l Ponnusamy, has filed a notice of motion dated 12 July 2012 to apply for a subpoena to be issued against The Right Honourable Gordon Brown, the former Prime Minister of the United Kingdom.

[2] The grounds or reasons for the application are as set out in the affidavit in support of the applicant (encl 2). The applicant describes himself as a social activist of the *Peguam Hak Asasi Manusia* and an advocate and solicitor of the High Court of Malaya of 21 years' standing. He claims to have been active in pro bono work for cases of public interest. He admitted to having been arrested and detained under the Internal Security Act 1960 on 13 November 2007 and also to having been arrested by the police on two other occasions in respect of public interest cases.

[3] The applicant avers that on 11 November 2007, two days before he was detained under the Internal Security Act for about 17 months, he was charged at the Sessions Court Kuala Lumpur for an offence under s 4(1)(c) of the Sedition Act 1948. However, the court notes that the charge that was annexed as exh 'UK1' is a charge for an offence under s 4(1)(a) of the Sedition Act 1948. The court notes the explanation of learned deputy public prosecutor that initially, the applicant was charged for an offence under s 4(1)(c) and the charge was subsequently amended to one under s 4(1)(a).

[4] The charge states that the applicant had committed an act that had a seditious tendency by writing a letter addressed to the right honourable Gordon Brown, Prime Minister of the United Kingdom entitled 'RE: 1. COMMONWEALTH ETHNIC INDIAN PEACE LOVING SUBJECTS IN MALAYSIA PERSECUTED BY GOVERNMENT BACKED ISLAMIC EXTREMIST VIOLENT ARMED TERRORIST WHO LAUNCHED A PRE DAWN VIOLENT ARMED ATTACK AND DESTROYED THE KG JAWA MARIAMAN HINDU TEMPLE AT 4.00AM THIS MORNING

(15 NOVEMBER 2007). 2. APPEAL FOR UK TO MOVE EMERGENCY UN RESOLUTION CONDEMNING 'ETHNIC CLEANSING' IN MALAYSIA. 3. APPEAL TO REFER MALAYSIA TO THE WORLD COURT AND INTERNATIONAL CRIMINAL COURT FOR CRIMES AGAINST ITS OWN ETHNIC MINORITY INDIANS.' which contained sentences with seditious tendencies. The alleged words with seditious tendencies were underlined in the letter which was attached to the charge.

[5] In para 7 of encl 2, the applicant avers that he 'terpaksa temu-ramah (interview), mengambil arahan dan memanggil sebagai saksi The Right Honourable Gordon Brown' in order to defend the criminal charge against him. And in para 8, he avers that he 'terpaksa mengambil arahan dan menemuramah The Right Honourable Gordon Brown' for him to be able to cross-examine the prosecution's witnesses in respect of the evidence that would be given by The Right Honourable Gordon Brown during the defence case.

[6] Vide a letter dated 29 June 2012, the applicant's solicitors, Messrs Manoharan & Co, had applied to the *Pendaftar Mahkamah Sesyen* for the issue of a subpoena against The Right Honourable Gordon Brown. However, the court had rejected the application on 3 July 2012.

[7] The applicant avers that his solicitors had communicated with Messrs Dotcom solicitors, a firm of solicitors in London, and they had agreed to make an application in the High Court in London for the purpose of serving the subpoena on The Right Honourable Gordon Brown.

[8] The submissions of learned counsel for the applicant follow the averments in the affidavit in support (encl 2). In summary, the applicant's application for a subpoena to be issued against The Right Honourable Gordon Brown, the former Prime Minister of the United Kingdom, is to enable the applicant to interview him:

(a) so that the applicant would be able to cross-examine the prosecution's witnesses; and

(b) to call him as a defence witness.

[9] The applicant's application is strongly opposed by the respondent on the grounds that:

(a) the application is premature; and

(b) The Right Honourable Gordon Brown is not a material witness nor is his evidence relevant to the charge against the applicant.

[10] In considering the merits of the applicant's application for the issue of a

subpoena to secure the attendance of The Right Honourable Gordon Brown, the former Prime Minister of the United Kingdom, for the purposes as set out in para 8 above, the court has considered a number of authorities cited by learned deputy public prosecutor.

[11] The case of *Ismail v Hasnul; Abdul Ghafar v Hasnul* [1968] 1 MLJ 108 involved an action for slander brought by Tun Tan Siew Sin, the Minister of Finance, against the respondent. The respondent denied making the defamatory statements which were published in the *Utusan Melayu*. In order to establish his defence, the respondent intended to call the appellants as his witnesses to testify that on other occasions *Utusan Melayu* had published defamatory statements purported to have been made of the respondent by the appellants and had subsequently requested *Utusan Melayu* to publish denials of such statements. Writs of subpoena *ad testificandum* were issued and served on the appellants requiring their attendance to testify for the defence at the trial. Both appellants applied to set aside the writs on grounds that it is vexatious and an abuse of the process of court. The applications, made by summons in chambers, were adjourned into open court and heard and dismissed by the judge.

[12] Upon the appellants' appeal to the Federal Court, the issue which arose for consideration was whether the issue of these subpoenas was an abuse of the process of the court. There, the Federal Court held that the main issue in that case was whether the plaintiff had been slandered by the respondent. Both appellants had denied knowledge or ability to give evidence on any issue relevant to the action. The Federal Court found that it was not apparent in what way the appellants could give any relevant evidence to assist the defence. The court went on to say that in the circumstances of the case, the court had the right to protect the appellants from the practice and process of the court being used simply for a matter that is misconceived and not for the purpose of justice. As was stated by Raja Azlan Shah J (as His Highness was then)

> The practice in all courts has been that a subpoena may be issued against anybody, be he a Minister of this Government or a nonentity. It cannot be gain said that a Minister has any more privilege than that enjoyed by a member of the public. Injustice will arise if equals are treated unequally. But the court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse: see *Raymond v Tapson* (1882) 22 Ch D 435. In three well known instances the court has set aside a subpoena as an abuse of its process. In *R v Hurle-Hobbs* [1945] KB 165 the court had no power to issue it. *Steel v Savory* 8 TLR 94 was a case of oppression. In *R v Baines* 25 TLR 79 the witness could give no relevant evidence. It is plain that these decisions do not enumerate all the cases which fall under this head. Each case must in the last analysis depend upon the evaluation of its own facts. The short question which this court has to enquire is whether its process issued against the appellants has been abused. In determining that question it is necessary to examine the law.

[13] In the case of *The King v Baines and another* [1909] 1 KBD 258, the applicants were The Right Honourable Herbert Henry Asquith and The Right Honourable Herbert John Gladstone, the Prime Minister and the Home Secretary respectively. They were served with writs of subpoena to appear and testify at the assises upon a trial of an indictment against the defendants for breach of the peace and unlawful assembly.

[14] From the facts, the applicants were present at a meeting held in the coliseum, a hall in Leeds. They were seated on the front of a platform, about sixty feet away from closed doors forming the entrance from a street called Cookridge Street into the hall. The door had glass panels in them. The charge against the defendants was that they, with other persons, unlawfully assembled in Cookridge Street and there committed other like offences. The defendants suggested that the applicants, from the position that they occupied on the platform, saw what was going on in Cookridge Street, and that they must have heard what was said in the street.

[15] The applicants filed affidavits swearing that they were wholly unable to give any evidence which could possibly be relevant to any issue that may arise. Each of the applicants also wrote to the solicitors for the defendant Baines saying that he did not see anything from the platform of the coliseum which would enable him to give relevant evidence at the trial of the defendants, that he saw nothing of what went on outside the coliseum and could give no evidence in any way material to the case.

[16] In that case, Bigham J, upon being satisfied that neither of the applicants could give relevant evidence and that the process of the court had not been issued for the purpose of obtaining relevant evidence, but for other purposes, set aside the subpoenas.

[17] The Court of Appeal case of *Dato' Seri Anwar bin Ibrahim & Anor v Public Prosecutor* [2000] 3 MLJ 638 involved an appeal against the decision of the learned trial judge for refusing to allow the defence to call the right honourable Prime Minister, Dr Mahathir Mohamad, as a witness. The learned judge had ruled, inter alia, that no useful purpose would be served by calling the Prime Minister to testify as his evidence would not be relevant.

[18] In dismissing the appeal, Lamin PCA had stated as follows:

> Strictly speaking the summons will only issue if 'it appears' to the magistrate that the witness is likely to be able to give 'material evidence': We repeat 'material evidence'. Who is to decide whether the evidence is 'material' or 'not'. It must be the trial judge or magistrate …

> In law a party cannot be denied of the benefit of a witness who is prepared to give material or relevant evidence. He has the right to call such a witness and therefore a summons will only issue to such a person. Hence the wording of Form XXXI. He has no right legal or otherwise to call any person not in possession of such evidence. So in the final analysis it is the court that decides and has control in the matter of calling witnesses in a criminal case so that only material witnesses will be summoned.

[19] Thus applying the authorities cited to the facts of our instant case, the issue that arise is whether The Right Honourable Gordon Brown can give any relevant or material evidence in relation to the charge against the applicant.

[20] In this case, the applicant is charged for an offence under s 4(1)(a) of the Sedition Act 1948. Subsection (1)(a) makes it an offence for any person who:

> does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act which has or which would, if done, have a seditious tendency.

[21] Is The Right Honourable Gordon Brown a material witness for the applicant on the above charge? As submitted by learned deputy, for an offence under s 4(1)(a), the prosecution would only have to prove that:

(a) the applicant made or wrote the letter; and

(b) the contents of the letter is seditious.

[22] The court agrees with learned deputy that for an offence under s 4 (1)(a), there is no necessity for the prosecution to prove that The Right Honourable Gordon Brown had received the letter, or to prove the truth or otherwise of the contents of the said letter. The court finds no merits in the submissions of learned counsel for the applicant that it is only the right honourable Gordon Brown who can answer if the underlined portions in 'Jadual A' are seditious. Similarly, the court disagrees with the submissions of the applicant himself that it is only the right honourable Gordon Brown who can answer whether para 2 of P13 ('Jadual A') can 'be seen as championing the cause of the Indian community in furtherance of the recommendations of the Reid Commission'. The court finds that The Right Honourable Gordon Brown is not a material witness in the charge against the applicant as the issue of whether the contents of the letter is seditious or otherwise is a matter for the sessions court to decide.

[23] The court further notes learned deputy's submissions that the case in the sessions court is still at the prosecution stage. The prosecution had called three witnesses and there were no other witnesses to be called. The prosecution would be closing their case and the court would be moving to the stage of

submissions of no case to answer. It follows therefrom that the sessions court had yet to make its ruling on whether a prima facie case had been made out and whether the applicant would be called upon to enter his defence.

[24] In these circumstances, the court finds that the applicant's application to subpoena The Right Honourable Gordon Brown so as to enable the applicant to interview him and hence be able to cross-examine the prosecution witnesses to be irrelevant and inapplicable. Since there are no more witnesses to be called for the prosecution's case, the applicant would no longer have any witnesses to cross-examine. The applicant had not stated that there would be an application to recall prosecution witnesses for purposes of further cross-examination.

[25] For the reasons afore-stated, the court found that there was no merit in the applicant's application for the issue for a subpoena for The Right Honourable Gordon Brown in respect of the applicant's sessions court trial. The application was accordingly dismissed.

Application dismissed.

Reported by Afiq Mohamad Noor